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IN THE

Supreme Court of the United States

October Term, 1964

No. 794

ANDREW GEOLY and THOMAS GEOLY,
Petitioners,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK; HONORABLE CHARLES MARKS as Justice of the Supreme Court of the State of New York, County of New York; and THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioners, Andrew Geoly and Thomas Geoly, pray that a writ of certiorari issue to review the order or judgment of the Court of Appeals of the State of New York, entered in this case as further described *infra*.

Opinions Below

An opinion rendered by the Supreme Court of New York, New York County, is not reported but is printed in our Appendix D herein, *infra*. The opinion of the Appellate Division of the Supreme Court of New York, First Depart-

ment, printed as Appendix C herein, *infra*, is not yet reported. The Court of Appeals of the State of New York, in dismissing the appeal from the Appellate Division taken as of right and in denying permission for leave to appeal, rendered no opinion.

Jurisdiction

The respective mandates of order of the Supreme Court of the State of New York, County of New York, summarily sentencing each of the within petitioners to imprisonment and fine for "direct" criminal contempt of court, are dated July 30, 1964 (Appendices E and F herein, *infra*). Execution of these contempt sentences remains stayed down to the present time, but petitioners are under direction to surrender for service of their sentences on January 6, 1965. The respective proceedings which the within petitioners instituted in the Appellate Division of the Supreme Court of New York, First Department, to review the contempt convictions, both by notice of appeal and by petition proceedings pursuant to the New York statutory procedure for review of "summary" orders of conviction for criminal contempt (New York Civil Practice Law and Rules, Article 78), were dismissed by the Appellate Division, First Department, by order dated November 12, 1964 (Appendix B herein, *infra*). The proceedings instituted by the within petitioners for further review in the Court of Appeals of the State of New York, consisting of a notice of appeal to that Court as of right and a motion for permission to appeal, were disposed of adversely to the within petitioners by order of the Court of Appeals of New York dated December 3, 1964 which dismissed the appeal as of right and denied permission to appeal, on the ground that no substantial

constitutional question was presented (Appendix "A" herein, *infra*). All of the above mentioned proceedings by the within petitioners seeking review of the contempt convictions in the appellate Courts of the State of New York were timely, and in all of those appellate proceedings the within petitioners expressly raised Federal constitutional questions, as shown *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), since the petitioners are claiming rights, privileges or immunities under the Fifth Amendment (self-incrimination) and the Fourteenth Amendment (due process of law) of the Constitution of the United States; and since there is necessarily drawn in question the validity of State statutes on the ground of their being repugnant to the Constitution of the United States, *viz.*, New York Penal Law §2447 (establishing procedures for conferral of immunity which we claim violate the Federal Fourth and Fourteenth Amendments) and certain provisions (cited and quoted *infra*) of New York Judiciary Law, Article 19 (providing for "summary" criminal contempt proceedings and punishment therefor which we claim are violative of Federal due process requirements under the Fourteenth Amendment and possibly also violative of such Federal due process requirement in that they allow substantial "summary" sentences of imprisonment for criminal contempt without, under the construction and application of said State statutes in this case, jury trial).

Questions Presented

Petitioners, two brothers who operate a very substantial, eminently respectable 80-year old family business of supplying costumes to the New York "Broadway" theater in-

dustry, were interrogated in July of this year by a New York State Grand Jury concerning alleged improper payments by their company (commercial bribery). When petitioners refused to answer on the ground of the privilege against self incrimination, the Grand Jury conferred immunity (N.Y. Penal Law §2447). On advice of counsel, petitioners took the position that the immunity conferrals were illegal and unconstitutional on State and Federal grounds. Petitioners were summarily convicted of alleged "direct" criminal contempt of court, after the State Justice (the within respondent Mr. Justice Marks) had required petitioners to re-enact before him the refusal to give testimony to the Grand Jury. Prison sentences of thirty days, plus fines, were imposed. The questions are:

1. Do the rulings in *Malloy* v. *Hogan*, 378 U.S. 1 and *Murphy* v. *Waterfront Commission*, 378 U.S. 52, concerning applicability to the States of the Fifth Amendment privilege against self-incrimination and concerning a constitutionally required mutuality of Federal-State immunity conferrals, justify the following defense in State criminal contempt proceedings for refusal to testify after State Grand Jury conferral of immunity:—That the proffered state immunity being legally and constitutionally defective under State law and under Federal Fifth Amendment standards, said immunity may expectedly not be honored by Federal prosecutive officials, so that the contempt defendant is justified in fearing Federal incrimination and, thereby, loss of the Federal-State mutualized immunity protections that are supposed to be available under the *Murphy* case? (The legal and constitutional defects in the proffered State immunity which are subsumed in the foregoing question are

(a) violation of a specific State procedural statute dealing with the immunity subject matter, (b) violation of the State Constitutional principle of separation of powers (Grand Jury conferral of immunity being an exercise by the Judicial Branch of Government of a power which is constitutionally Legislative or Executive in nature), and (c) violation of Federal due process and Federal Fifth Amendment self-incrimination standards owing to the procedurally slack and arbitrary manner in which the State immunity was ostensibly conferred.)

2. Varying the emphasis of the above question, we ask:— Is it not as sure as such things can be that diligent and responsible Federal prosecuting authorities whose hands in a particular law enforcement matter are tied (under the rule of the *Murphy* case) by a State conferral of immunity, will feel themselves in duty bound to scrutinize "with eagles' eyes" the legal and constitutional adequacy of the State immunity procedure employed in the particular case, lest otherwise the area of Federal criminal law enforcement be whittled away by an indiscriminate process of procedurally slack or otherwise legally or constitutionally insufficient State immunity conferrals? Is not this Court's prompt guidance needed concerning this important and difficult problem which seems to have been opened but left unresolved by the *Malloy-Murphy* cases, and which seems certain to arise in numerous other cases throughout the country?

3. Is it a violation of Federal due process to utilize the powers of "summary" imprisonment for "direct" contempt in State proceedings, rather than to afford to the alleged contemnor proper notice and hearing as upon a charge of crime, where the alleged contempt consists of

refusal to answer State Grand Jury questions after conferral of immunity by the Grand Jury, all done outside of the presence of the Court itself, and where the justification asserted for the use of the "summary" contempt power is that the sentencing State Judge had the authority to compel the alleged contemnors to reenact before him personally in open Court the prior out-of-Court refusals to testify before the Grand Jury?

4. Is it a denial of Federal due process for a State Court to impose a 30 day prison sentence "summarily" for "direct" contempt (in the circumstances of this case) after denying a request for a Jury trial? (This question is respectfully preserved in the event of the granting of certiorari.)

Constitutional and Statutory Provisions Involved

The case involves the Fifth and Fourteenth Amendments (self-incrimination and due process of law) of the United States Constitution; Articles III, IV and VI of the New York State Constitution (from which the principle of separation of powers is derived in that State as we note more fully in a moment); N.Y. Penal Law §2447 (conferral of immunity); and N.Y. Judiciary Law §§750, 751, 752 and 755 (criminal contempt and "summary" punishment). The New York State Constitutional provisions referred to are lengthy and need not be quoted because they are respectively the entire "Legislative", "Executive" and "Judicial" Articles of that State's Constitutions from which the principle of separation of powers is deemed to be derived al-

though not expressly declared therein.* The New York statutes above mentioned are quoted in our Appendix I herein, *infra*.

Statement of the Case and of How the Federal Questions Are Presented

A preliminary word as to the record materials which we are filing with this petition:—With exceptions to be mentioned, everything contained in the certified record of the proceedings below is conveniently available in printed form for the purposes of this certiorari application, i.e., in the form of the printed item in the record entitled "Notice of Petition, And Joint Petition Pursuant to C.P.L.R. Art. 78", etc., captioned in the Supreme Court of the State of New York, Appellate Division—First Department, nine additional copies of which are filed herewith. This printed "Notice of Petition", etc., contains what amounts to the complete record of the Grand Jury proceedings, and of the contempt proceedings before Mr. Justice Marks. This same printed "Notice of Petition" contains also—in fact it is—the petitioner's application in the Appellate Division for review of the contempt sentences. The remainder of the certified record—the exceptions above referred to which are not contained in the printed "Notice of Petition", etc.—consists of the following: (1) Petitioners' papers in the Court of Appeals of New York seeking review of the order of the Appellate Division denying relief—this latter order (plus the opinion) of the Appellate Division being part of these last mentioned papers of ours in the Court of Appeals

* Cf. *Wolff* v. *Mortgage Commission*, 270 N.Y. 428; *People Ex rel. Consolidated Water Co. of Utica* v. *Maltbie*, 275 N.Y. 357.

of New York, and being separately printed *infra* herein as Appendices B and C; the remainder of the aforementioned application of petitioners in the New York Court of Appeals is printed herein *infra* as Appendix G. (2) A "Respondents' Memorandum" (typewritten) in the New York Court of Appeals opposing our aforementioned application in that Court for further review—this "Respondents' Memorandum" is printed herein *infra* as Appendix H. (3) The order of the New York Court of Appeals, dated December 3, 1964, denying our application for further review (on the ground that no substantial constitutional question was presented)—at the time of the writing of this petition for certiorari the latter order of the Court of Appeals is available to us only in the telegram form which we print herein *infra* as Appendix A; a certified copy of the latter order will of course be filed as part of the certified record herein.

Also, our aforesaid application for review in the New York Court of Appeals was accompanied by copies of our aforesaid printed "Notice of Petition", etc., which we had filed in the Appellate Division (nine extra copies of which, as above said, are filed herewith); and by copies of our rather extensive printed "Brief for Petitioners-Movants-Appellants" in the Appellate Division.* For the reasons

* As is not uncommon in contempt proceedings, the successive stages in the State Courts were pushed, by the prosecution and by the Courts concerned, at a very rapid pace. Petitioners' showing before the New York Court of Appeals had to be done especially expeditiously, and we met the problem by filing rather short papers in the Court of Appeals to which we annexed the above mentioned printed "Notice of Motion" and also of the printed brief that we had used in the Appellate Division. We mention these circumstances here because, as further noted in the text above which follows this footnote, we are obliged to request this Court to take into consideration our aforementioned printed brief in the Appellate Division.

explained in the footnote just appended, we are also filing herewith nine extra copies of the latter printed brief, which we are respectfully requesting this Court to peruse and to take into consideration both in petitioners' interest and in aid of this Court's own convenience in evaluating the merits of petitioners' contentions in the State Courts below.

The above mentioned printed "Notice of Petition", etc. is sometimes cited hereinafter as "N.P. ". The other above mentioned items of record herein will be cited in ways which will be self-explanatory as the references appear.

As briefly recited in the prefatory statement to our "Questions Presented", *supra*, petitioners were summarily sentenced to imprisonment (thirty days) and fine ($250) for their refusal to answer Grand Jury questions about alleged commercial bribery, these refusals having occurred after conferral of immunity by the Grand Jury, and the "summary" or "direct" contempt theme having been imported into the case *via* the procedure of compelling petitioners to reenact in open Court (as a part of the contempt proceeding itself) their Grand Jury refusals (which had occurred outside of the direct personal presence of the Court).

In those contempt proceedings in the latter Court (before New York Supreme Court Justice Marks) petitioners' contentions, insofar as pertinent to the within certiorari application, may be grouped along the following three lines: (1) the illegality and unconstitutionality of the immunity conferrals by the Grand Jury; (2) the illegality and unconstitutionality of the resort to "summary" contempt procedures--with which is to be considered the synthesized creation of "direct" contempts by compelling petitioners

to reenact before the Judge their Grand Jury refusals; and (3) the denial of jury trial.

Let us examine the course of these Grand Jury and contempt proceedings in the light of the above three-fold issue framework.

First, as is set forth in detail in the previously mentioned printed "Notice of Petition" etc. (see page citations *infra*), the actual procedural mechanics of the conferral of immunity by the Grand Jury were little short of farcical, as compared with what was legally required under the applicable State immunity legislation (N.Y. Penal Law §2447—quoted in Appendix I herein *infra*). Petitioners contended in the Courts below (and they respectfully contend here) that this procedural slackness in the conferral of immunity —see details in a moment—presented grave constitutional issues on a Federal level, to wit, that if the ostensible conferral of immunity was invalid on state grounds then petitioners would have reasonable cause to fear future Federal incrimination notwithstanding the supposed State immunity because it could reasonably be anticipated that conscientious Federal prosecutive officials would decline to accept the thwarting of Federal prosecution by a thus indicatedly invalid and slack State immunity conferral, which would in turn mean that the petitioners herein would expectedly lose the benefit of the Federal constitutional rights derivable from this Court's recent decisions in *Malloy* v. *Hogan*, 378 U.S. 1 and *Murphy* v. *Waterfront Commission*, 378 U.S. 52—*viz.*, the rights of a mutualized State-Federal immunity protection when the one sovereignty or the other confers immunity. Under our "Reasons For Granting The Writ", *infra*, we develop more fully the theory of this position

of the petitioners in regard to the *Malloy-Murphy* cases. The procedural slackness and state statutory *ultra vires* in the Grand Jury immunity conferrals in this case included the following:—The Grand Jury in effect abdicated *ad hoc* to an Assistant District Attorney its statutory power and responsibility of conferring immunity under N.Y. Penal Law §2447; the Grand Jury manifestly played only a mere puppet role; the record shows (see citations *infra*) that the Grand Jury either did not deliberate at all or did so in a merely perfunctory (if not altogether sham) manner in carrying out the immunity conferral; the Assistant District Attorney was obviously and completely in effective control of the alleged immunity proceedings in the Grand Jury, and the latter body enacted a mere mummery; moreover, the Grand Jury did not meet the statutory requirements of Penal Law §2447 as regards the making of a formal "order" of immunity-conferral, or as regards the preservation of a proper or adequate formal record of the immunity-conferral proceedings. The evidences of this procedural slackness in the Grand Jury immunity-conferral proceedings are described at N.P. 5-6, 8-10, 13, 15-18, 24-26, 27, 28-29, 43, 46-9, 76, 80-81, 87-92. See also the previously mentioned printed "Brief for Petitioners-Movants-Appellants", etc., in the Appellate Division, pp. 3, 17-27, 32-44, 47 (nine extra copies of which, as mentioned, are filed herewith).

Second, petitioners also contended in all of the Courts below that the immunity violated the New York State Constitutional principle of separation of powers in that the immunity power is executive or legislative in nature, whereas a system of immunity-conferral by Grand Juries lodges the power in the Judicial Branch of the Government.

Petitioners contended that this violation of the New York State Constitution must in turn give rise to a Federal constitutional aggrievement on petitioners' part in that conscientious Federal prosecutive officials would expectedly decline to be bound by a State immunity-conferral that was thus indicatedly invalid on State constitutional grounds, so that, again, the Federal constitutional right of petitioners under the *Malloy-Murphy* rule of this Court for the Federal-State mutualization of immunity conferrals by either sovereignty would expectedly be frustrated. These contentions of the petitioners in the Courts below appear at N.P. 12, 13-14, 41, 42, 43, 44, 68-69, 74, 79-80, 95-96; and in our aforementioned printed Brief at pp. 4-16, 24-27.

Third, petitioners further contended in all of the Courts below that this Court's respective opinions in the *Malloy* and *Murphy* cases (especially in the latter case) had of necessity implied that—or at the least had left open the question of whether—Federal constitutional standards of due process and self-incrimination must be satisfied in any given instance of State immunity conferral. Petitioners contended that such seem to be the necessary implications of *Malloy-Murphy*, because, (1) State immunity procedures must now satisfy those Federal constitutional standards simply as a matter of living up to the new "nationalized" scope of the self-incrimination protections (*Malloy*), and (2) this requisite satisfying of Federal constitutional standards in State immunity conferrals becomes an absolute practical administrative necessity lest the new mutualization of Federal-State immunity (*Murphy*) should bring about a thwarting of Federal law enforcement even in the most casual and slack situations of State immunity conferral.

This theme is further developed in our "Reasons For Granting The Writ", *infra*. Our presentation of the above themes in the Courts below appears at N.P. 5-6, 8-18, 24-29, 41-44, 46-49, 76, 80-81, 87-92; and at pp. 17-27 of our aforementioned printed brief in the Appellate Division (nine copies of which, as mentioned, are filed herewith).

Fourth, the items in the summary contempt proceedings before Mr. Justice Marks which pertain to petitioners' contention that, their alleged contempt having occurred before a Grand Jury and not in the personal presence of the Court itself, they were entitled to a full trial upon notice and hearing as upon a charge of crime, appear at N.P. 15, 24, 26, 29, 60-66, 70-71, 76, 81-83; and in our aforementioned printed Brief at pp. 3, 30-47. Specifically, the interesting procedure whereby Mr. Justice Marks compelled petitioners to reenact in open Court before him their Grand Jury refusals to testify is described at N.P. 10-11, 16, 25, 29, 77, 82, 92-95; and the aforesaid Brief at pp. 31, 38, 40, 42-44. The citations just given comprise also our presentation on the topics referred to in the Appellate Division; for our presentation on these topics in the Court of Appeals, see Appendix G, herein, *infra*.

Petitioners' appearances before the Grand Jury and the contempt proceedings before Mr. Justice Marks—where all of the above issues were litigated and decided adversely to petitioners—took place within the month of July 1964. On July 30, 1964 the petitioners were summarily adjudged guilty of criminal contempt (for refusal to answer the single question "What is your business or occupation?"—N.P. 47, 52; Appendices E and F herein, *infra*)—and each was sentenced to thirty days imprisonment and $250 fine.

(Execution of these sentences has been stayed down to the present time by a succession of Court orders and consents.)

The procedure in New York State for appellate review of summary criminal contempt sentences is conventionally regarded as being by way of a so-called "Article 78" proceeding in the Appellate Division of the Supreme Court (i.e., Article 78 of the New York Civil Practice Law and Rules), which is in the nature of a more or less plenary appellate review on the record as to issues of both fact and law. The petitioners herein brought such an Article 78 proceeding in the Appellate Division to review their contempt convictions; and, in order to avert any possibility of failure to have exhausted alternative remedies, petitioners also invoked the regularly applicable appellate jurisdiction of the Appellate Division by way of an appeal instituted by a notice of appeal. The previously mentioned printed "Notice of Petition", which is before this Court, comprised our "Article 78" papers in the Appellate Division. In those papers in the Appellate Division we urged all of the issues mentioned above in our recital of the proceedings before Mr. Justice Marks. Our notices of appeal to the Appellate Division appear at N.P. 54, 56. On November 13, 1964 the Appellate Division dismissed the Article 78 petition, and, deeming the protective appeal proceedings as being consolidated with the Article 78 proceedings, the appeals likewise were dismissed. In a short opinion (Appendix C herein, *infra*) the Appellate Division stated that "the challenged procedures appear consistent with approved practice" (citing New York State decisions), and that "we find in them no element of unfairness". The Appellate Division

also stated in its opinion that "the pertinence" of this Court's decisions in the *Malloy* and *Murphy* cases "is not demonstrated". The brief filed in the Appellate Division on behalf of the respondents (our adversaries) included the following Points:

> "POINT I—The procedure under which the petitioners were adjudicated in contempt was valid.
>
> * * * * *
>
> (b) The petitioners were properly brought before the court by an order to show cause; their refusal to answer in the presence of the court rendered them punishable for contempt summarily.
>
> "POINT II—The grand jury conferral of immunity was valid.
>
> (a) The grand jury has authority to confer immunity.
>
> (b) The direction to answer by the grand jury foreman constituted an 'order' within the meaning of section 2447 Penal Law.
>
> (c) The immunity provided by section 2447 Penal Law satisfies the requirements of the privilege against self-incrimination.
>
> (d) The *Malloy* and *Murphy* decisions do not affect the validity of the New York immunity law."

The New York State procedure for review in the Court of Appeals in a situation of the present type is, in the alternative, by appeal as of right where constitutional issues are presented in a certain manner (N.Y. Civil Practice Law and Rules §5601(b)) or by motion for permission or leave

to appeal. We pursued both of these avenues. Our notice of appeal to the Court of Appeals and our motion for leave or permission to appeal to the Court of Appeals are printed in Appendix G, herein, *infra*. The issues which we raised in the Court of Appeals included all of those previously mentioned issues which we had raised in the lower courts. The respondents (our adversaries herein) filed a "Respondents' Memorandum" in the Court of Appeals which is printed in Appendix H herein, *infra*; the latter memorandum was very short, and we respectfully refrain from summarizing it because it does not appear to us to have added anything of substance to the respondents' previously mentioned printed brief in the Appellate Division. On December 3, 1964 the Court of Appeals dismissed our appeal taken as of right and denied permission to appeal, without opinion, in an order stating that no substantial constitutional question was presented (Appendix A herein, *infra*).

In the course of our above recitals in this Statement of the Case we have included, at appropriate places, recitals pertaining to the matter of how the Federal questions in this certiorari application are presented. As seen, in the contempt proceedings in the court of first instance (before Mr. Justice Marks) the questions as to the validity of the immunity conferrals under state law, the consequent as well as the absolute Federal constitutional insufficiency of those immunity conferrals, and the due process adequacy of the summary contempt procedure were presented and necessarily decided. The same is true of the proceedings in the Appellate Division, where the propriety and fairness of the resort to the summary contempt procedure were expressly approved, and where our Federal constitutional

contentions in regard to the immunity-conferrals as prejudicing our rights under the *Malloy* and *Murphy* decisions of this Court were expressly declared to be "not demonstrated." In the Court of Appeals, although the Court did not write an opinion, its order disposing of our appeal taken as of right and our motion for permission to appeal stated that no substantial constitutional question is presented—our papers in the Court of Appeals, which expressly incorporated all of our printed papers (including our printed brief) in the Appellate Division, having presented all of the above mentioned issues which were necessarily or expressly decided in the two Courts below the Court of Appeals.

Reasons for Granting the Writ

1. As we read the *Malloy* and *Murphy* decisions of this Court, the law of self-incrimination and immunity-conferral in this country now is that the States, in these matters, are bound to comply with the standards of the Fifth Amendment. It seems to us also that one necessary effect of the *Malloy* and *Murphy* decisions is that State law and State procedures in the conferral of immunity from prosecution (as a means of overriding a claim of the privilege against self-incrimination) will have to satisfy the standards of the Fifth Amendment, the same as Federal statutes and processes for such immunity conferral must satisfy the standards of that Amendment. The *Murphy* and *Malloy* decisions did not indicate how this process of testing out the Federal constitutional adequacy of State immunity procedures would be approached in future cases, but it is not too difficult to foresee the general direction that such develop-

ments must inevitably take. The essential holding of *Murphy* is that a State grant of immunity is constitutionally inadequate unless it results in plenary protection against Federal as well as State incrimination. One obvious result of this holding is that the immunity conferral powers of the States have now become immeasurably more potent than was true prior to the *Murphy-Malloy* decisions because it now lies within the power of State immunity conferral agencies to tie the hands, so to say, of the Federal prosecuting authorities every time the State agency sees fit to confer its own State immunity processes upon an individual. This, in turn, as we phrased it in our "Questions Presented", *supra,* makes it not at all difficult to foresee that diligent and responsible Federal prosecuting authorities whose hands in any particular matter* have been tied or supposedly tied by a State conferral of immunity will feel themselves in duty bound to scrutinize with all closeness and circumspection the legal and constitutional adequacy of the State immunity procedure employed in the particular case, lest otherwise the area of Federal criminal law enforcement be whittled away by an indiscriminate process of procedurally slack or otherwise legally or constitutionally insufficient State-immunity conferrals. It may be foreseen as an indubitable certainty, then, that in many instances in the future Federal prosecuting authorities will feel themselves called upon to examine closely into the question of whether particular State conferrals of immunity are not only in compliance with the Federal Fifth

* In this very case, involving charges of commercial bribery, it is evident that Federal criminal legislation under the Internal Revenue Laws, the Anti-Racketeering and Extortion laws and conspiracy may be involved as a matter of "reasonable fear of Federal incrimination."

Amendment standards in the sense in which the Federal Government's own immunity conferrals must obey those standards, but also, from the standpoint of whether the State immunity is, taken in its overall procedural and legal character, of such a quality as to satisfy the following two tests: (1) Does the State immunity satisfy all of the requirements of the law of the State itself? (2) Is the State immunity process involved of such an all-around quality, in point of legality and constitutionality (both State and Federal) as well as satisfying other policy requirements of Federal law enforcement, as to justify the acceptance thereof by Federal prosecuting authorities and Federal courts for the purposes of wiping out the right of Federal prosecution?

For example, let us suppose that a particular State immunity statute allowed a State Grand Jury to confer immunity and it is shown in a particular case that the Grand Jury foreman alone, without the assent of the other grand jurors, had taken it upon himself to confer the immunity. This would involve a violation of the State law itself, rendering the immunity invalid, and thereupon it is obvious that Federal officials and Federal courts would be justified and indeed obliged to treat such abortive conferral of State immunity as being ineffective to bar Federal prosecution. As a matter of fact, we, in this very case, were precluded from pursuing our legitimate efforts to learn whether any such *ultra vires* process had taken place, by the refusal of the Court to furnish us with the full transcript of the Grand Jury minutes of July 29, 1964 (N.P. 29).

Let us take another example: Let us suppose that there exists a State statute permitting any individual policeman to confer immunity upon any suspect in any informal po-

lice interrogation. Even supposing, further, that such a hypothetical State statute would be constitutional under the terms of the particular State Constitution hypothetically involved, is it conceivable that Federal prosecuting authorities and Federal courts would sit by and remain content with such a slack and indiscriminate State immunity-conferrral process whose consequences would entail not only the prevention of State prosecution but also of Federal prosecution?

Cf. the language of Mr. Justice White's concurring opinion (in which Mr. Justice Stewart joined) in the *Murphy* case, *supra,* at 12 L. Ed. 2d p. 678, where the vital interests of the Federal Government in preventing slack, indiscriminate or unauthoritative immunity-conferrals which would bar federal prosecution are emphasized.

We shall not here repeat the several specific flaws of State statutory *ultra vires* in the conferral of immunity in the within Grand Jury proceedings, which were described in our Statement of the Case, *supra.* In our printed brief in the Appellate Division, below, nine copies of which are filed herewith, we discuss in detail (Point III, pp. 17-27) these State statutory flaws. Also in the latter printed brief (Point II, pp. 8-16) we develop at some length the point as to the indicatedly invalid character of the New York State Grand Jury immunity power under Penal Law §2447 as being violative of the State constitutional principle of separation of powers. Cf. *Ullmann* v. *United States,* 350 U.S. 422; *Feldman* v. *United States,* 322 U.S. 487, 493; *Doyle* v. *Hofstader,* 257 N.Y. 244, 177 N.E. 489.

It is true that the Courts below in the instant case deemed our constitutional objections to be without merit. But, since

none of the Courts below dealt expressly at all with the questions we raised as to the issues of State statutory *ultra vires* and State unconstitutionality in the within immunity conferrals, the decisions below cannot be read as meaning anything more than that our claim of reasonable fear of Federal incrimination—through expected refusal of Federal prosecutive officials to be bound by these particular State immunity conferrals—was found to be without merit. But this last is a Federal, not a State, constitutional question.

As a matter of fact, just within the past month, in *United States* v *Interborough Delicatessen Dealers Association Inc.,* S.D.N.Y., decided November 4, 1964 (Levet, D.J.), a New York State immunity was held not binding upon Federal prosecutive officials on the ground that the *Malloy-Murphy* decisions did not operate to thwart Federal prosecution through the Federal-State immunity-mutualization rule of those cases unless the particular State immunity satisfied Federal Fifth Amendment standards. Here, with a vengeance, has starkly appeared, and within a very short time after the handing down of the *Malloy-Murphy* decisions, precisely the peril that we have been announcing in this very litigation all along since July of this year as being predictable and indeed inevitable. The above mentioned decision of Judge Levet is not yet reported; we print a copy thereof as Appendix J herein, *infra.*

2. The resort in this case to the State powers of "summary" punishment for "direct" criminal contempt worked a violation of Federal constitutional due process. The alleged contempts occurred before the Grand Jury, in the absence of any Justice of the Supreme Court of New York. As seen, Mr. Justice Marks thereafter, in the course of the

"summary" contempt proceedings themselves, compelled the petitioners to reenact before him their refusals to answer before the Grand Jury, whereby the petitioners were arbitrarily—and, we submit, unconstitutionally—placed in the position of allegedly committing a "direct" contempt in the immediate face and presence of the Court, which in turn was utilized by the Court as a justification for invoking the processes of "summary" punishment as for direct criminal contempt, instead of according to petitioners a full and fair trial upon charges of "constructive" contempt of court. This overlooked the familiar rule, recognized by the New York cases, that due process of law in criminal contempt requires adequate notice and hearing. *People* v. *Albany County,* 147 N.Y. 290; *Douglas* v. *Adel,* 269 N.Y. 144; *In re Rotwein,* 291 N.Y. 116—all of these being cases which enunciate or enforce this constitutional requirement of notice and hearing where, as here, the alleged contempt has not occurred within the hearing and sight of the Court itself and the Court is unable (without compelling a "re-enactment") to state from its own knowledge the facts constituting the alleged contempt. To similar effect see also *Spector* v. *Allen,* 281 N.Y. 251. A trial should have been had in the present case, and it should have been in all substantial respects the equivalent of a trial for crime. The general ambit of defenses in a trial for criminal contempt is not discernibly different from that in prosecutions for crime. *Cooke* v. *United States,* 267 U.S. 517, 536-539; *In re Rotwein,* 291 N.Y. 116. The right of a defendant in a trial for criminal contempt to assert his defenses is founded in constitutional due process. *Cooke* v. *United States, supra.* Cf. *United States* v. *United Mine Workers,* 330 U.S. 258, 363-376 (dissenting op.). Spe-

cifically, the defense of lack of criminal intent, together with related defenses as to motive, good faith, justification, and the like, and, in general, full right to make "defense or explanation", are accorded to defendants in criminal contempt trials. The leading case is, again, *Cooke* v. *United States, supra.* Also, see, e.g., *In re Chiles,* 22 Wall. 157, 169; *Ex parte Savin,* 131 U.S. 280, 286; *Sinclair* v. *United States,* 279 U.S. 749, 765-768. The New York Courts hold that the rule of reasonable doubt applies in criminal contempt. *Mengel* v. *Larkin,* 230 App. Div. 783, 244 N.Y.S. 697 (2nd Dept. 1930).

3. In the event of the granting of certiorari, petitioners would respectfully reserve, under the authority of *Barnett* v. *United States,* 12 L. Ed. 2d 23, the question of whether the Federal Constitution requires a jury trial in State criminal contempt proceedings where a prison sentence of thirty days may be (and here has been) imposed..

CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

KLEINMAN, GOLD and LANDSMAN
Attorneys for Petitioners
Andrew Geoly and Thomas Geoly

APPENDIX A

Telegram Order of Court of Appeals (December 3, 1964)

(Certified copy of this order will be filed as part of Certified Record.)

WESTERN UNION

TELEGRAM

1964 DEC 3 PM 4 49

LL595 445P EST DEC 3 64 SYC409
SY ABB265 COLLECT ALBANY NY 3 249P EST
KLEINMAN GOLD & ANDSMAN
66 COURT ST BROOKLYN NY

MATTER OF GEOLY

MOTION FOR LEAVE TO APPEAL AND FOR A STAY DENIED. APPEAL TAKEN AS OF RIGHT DISMISSED, WITHOUT COSTS, UPON THE GROUND THAT NO SUBSTANTIAL CONSTITUTIONAL QUESTION IS INVOLVED.

RAYMOND J CANNON CLERK COURT OF APPEALS ALBANY NY (34).

APPENDIX B

Order of Appellate Division (November 12, 1964)

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 12th day of November, 1964.

Present:

HON. BERNARD BOTEIN,
Presiding Justice,

" BENJAMIN J. RABIN,
" FRANCIS L. VALENTE,
" HAROLD A. STEVENS,
" SAMUEL W. EAGER,
Justices.

8047

In the Matter of the Application of
ANDREW GEOLY and THOMAS GEOLY,
Petitioners,

vs.

HONORABLE CHARLES MARKS as Justice of the Supreme Court of the State of New York, County of New York and The Supreme Court of the State of New York, County of New York,
Respondents

To review and annul, pursuant to Article 78 of the Civil Practice Law and Rules, the respective adjudications and the respective mandates of orders dated July 30, 1964, adjudging each of the petitioners guilty of criminal contempt of court, and punishing each of them therefor

and/or

In the Matter of the Respective Applications of the Second July 1964 Grand Jury of the County of New York to Punish Andrew Geoly and Thomas Geoly for criminal contempt.

ANDREW GEOLY and THOMAS GEOLY,
Appellants.

Appendix B—Order of Appellate Division
(November 12, 1964)

The above-named petitioners, Andrew Geoly and Thomas Geoly, having presented a joint and several petition, verified the 27th day of August, 1964, to this Court, praying for an order pursuant to the provisions of Article 78 of the Civil Practice Law and Rules, annulling the determination and orders of respondent, Honorable Charles Marks, as Justice of the Supreme Court of the State of New York, County of New York, dated July 30, 1964, adjudging each of the petitioners guilty of criminal contempt of court and sentencing each to thirty days imprisonment and a $250 fine; staying the execution of the aforesaid sentences for criminal contempt of court; consolidating the within Article 78 proceedings with the alternative or supplementary proceedings by appeal; and for other relief,

Now, upon reading and filing the notice of application, with proof of due service thereof, the joint and several petition of Andrew Geoly and Thomas Geoly, duly verified the 27th day of August, 1964, and the affidavit of Eugene Gold, duly sworn to the 27th day of August, 1964, all read in support of the petition, and after hearing Mr. Eugene Gold in support of the petition, and Malvina H. Guggenheim in opposition to the application of the petitioners, and due deliberation having been had thereon; and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the petition be, and the same hereby is, dismissed as to each petitioner, without costs. That branch of the motion seeking to consolidate the protective appeal proceedings with the Article 78 proceeding is granted, and the appeals from the orders of the Supreme Court, New York County, entered on July 30, 1964, are dismissed.

ENTER:

VINCENT A. MASSI
Clerk

APPENDIX C

Opinion of Appellate Division

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department at the Court House of the Appellate Division in the County of New York, on the 12th day of November, 1964.

Present:

HON. BENJAMIN J. RABIN,
Justice Presiding,

" JAMES B. M. MCNALLY,

" SAMUEL W. EAGER,

" AARON STEUER,

" G. ROBERT WITMER,

Justices.

The Court announces the following decisions: Botein, P.J., Rabin, Valente, Stevens and Eager, J.J., 8047.

In the Matter of the Application of

ANDREW GEOLY and THOMAS GEOLY,

Petitioners,

vs.

HONORABLE CHARLES MARKS as Justice of the Supreme Court of the State of New York, County of New York and The Supreme Court of the State of New York, County of New York,

Respondents,

Appendix C—Opinion of Appellate Division

To review and annul, pursuant to Article 78 of the Civil Practice Law and Rules, the respective adjudications and the respective mandates of orders dated July 30, 1964, adjudging each of the petitioners guilty of criminal contempt of court, and punishing each of them therefor

and/or

In the Matter of the Respective Applications of the Second July 1964 Grand Jury of the County of New York to Punish Andrew Geoly and Thomas Geoly for criminal contempt.

ANDREW GEOLY and THOMAS GEOLY,

Appellants.

Petition pursuant to Article 78 CPLR, for annulment of orders dated July 30, 1964, adjudging petitioners guilty of criminal contempt of court, unanimously dismissed as to each petitioner, without costs. The challenged procedures appear consistent with approved practice (Matter of Second Grand Jury v. Cirillo, 12 N.Y. 2d 206; People ex rel. Cirillo v. Warden, 11 N.Y. 2d 61; Matter of Grand Jury [Cioffi], 8 N.Y. 2d 220; People v. Riela, 7 N.Y. 2d 371; People v. Hackley, 24 N.Y. 74), and we find in them no element of unfairness. The pertinence of the recent United States Supreme Court decisions cited to us (Malloy v. Hogan, 378 U.S. 1; Murphy v. Waterfront Comm'n, 378 U.S. 52) is not demonstrated. The branch of the motion seeking to consolidate the protective appeal proceedings with the Article 78 proceedings is granted, and said appeals are dismissed. Order filed.

APPENDIX D

Opinion of Supreme Court of the State of New York, County of New York (Marks, *J.*, July 23, 1964)

SUPREME COURT

NEW YORK COUNTY

SPECIAL AND TRIAL TERM—PART XXX

In the Matter of

Application of the Second July 1964 Grand Jury of New York County to punish

ANDREW GEOLY and THOMAS GEOLY

for criminal contempt.

MARKS, J.:

By separate orders issued by this Court, Andrew Geoly and Thomas Geoly were directed to show cause before me on July 13, 1964 why orders should not be made adjudging the said Andrew and Thomas Geoly guilty of criminal contempt for their refusal to testify and to answer legal and proper interrogatories before the Second July 1964 Grand Jury of the County of New York and why said Andrew Geoly and Thomas Geoly should not be punished as and for criminal contempts pursuant to Art. 19 of the Judiciary Law and §619 of the Code of Criminal Procedure. On the return of said orders to show cause, Kleinman, Gold & Landsman, Esqs. appeared specially and contested the jurisdiction of the Court to proceed on the ground that the Grand

Appendix D—Opinion of Supreme Court of the State of New York, County of New York (Marks, J., July 23, 1964)

Jury "contempt" matter may not lawfully proceed by an order to show cause. This Court has inherent jurisdiction and power to direct the appearance of any witness in any matter or proceeding pending before any branch of the Supreme Court. The cases cited by counsel for the witnesses, Andrew and Thomas Geoly do not in any way contradict this statement of law. I find that §750 of the Judiciary Law sufficiently describes the power of the Court in a proceeding of this type. The special appearance is therefore overruled and the witnesses Andrew Geoly and Thomas Geoly are directed to appear before this Court, on Tuesday, July 28, 1964, at 11 A.M., in Part XXX thereof, at 100 Centre Street, New York 13, N. Y.

Dated: July 23, 1964.

CHARLES MARKS
J. S. C.

APPENDIX E

Mandate of Order of Contempt (July 30, 1964)
(Andrew Geoly)

At a term of the Supreme Court of the State of New York, held in and for the County of New York, in Part XXX thereof, at the Criminal Courts Building, 100 Centre Street, City, County and State of New York, on the 30th day of July, 1964.

Present:

HON CHARLES MARKS,

Justice.

In the Matter

of

The Application of the Second July 1964 Grand Jury of the County of New York to punish

ANDREW GEOLY

for Criminal Contempt.

MANDATE OF ORDER ADJUDGING WITNESS GUILTY OF CONTEMPT

The Second July, 1964 Grand Jury, heretofore in due form of law selected, drawn, summoned and sworn to serve as Grand Jurors in the Supreme Court of the State of New York, a court of record in and for the County of New

Appendix E—Mandate of Order of Contempt (July 30, 1964) (Andrew Geoly)

York, and now actually acting as the Second July, 1964 Grand Jury in and for the body of the said County of New York, having made application herein by Order to Show Cause dated July 9, 1964, pursuant to Section 619 of the Code of Criminal Procedure and Article 19 of the Judiciary Law, duly served upon Andrew Geoly, and a hearing having been had on said application on July 13, 1964, July 14, 1964 and further hearing pursuant to intermediate memorandum decision of this Court dated July 23, 1964, having been had on July 28, 1964, come into court on July 29, 1964 and make complaint by and through their foreman, theretofore duly appointed and sworn, and it appearing to the satisfaction of the Court that Andrew Geoly, on July 7, 1964 and on July 29, 1964, after appearing before said Grand Jury as a witness and after having been duly sworn in the manner prescribed by law as a witness in a certain matter and investigation pending before such Grand Jury whereof they had cognizance against John Doe et al for the crime of conspiracy in violation of Penal Law Section 580 and the crime of corrupt influencing of agents, employees and servants, in violation of Penal Law Section 439, did persistently refuse to answer a legal, proper and relevant question concerning his employment and occupation which was propounded to him, and the said Andrew Geoly instead of answering the said question refused to answer and did contumaceously and unlawfully refuse to answer the same and gave no lawful reason therefor;

And the Court, on July 29, 1964, after hearing argument by counsel for the said witness Andrew Geoly and the District Attorney, and having then and there held a hearing at which the following questions of the District

Appendix E—Mandate of Order of Contempt (July 30, 1964) (Andrew Geoly)

Attorney and responses of the witness before the Grand Jury were duly referred to:

> Mr. Cohen: Andred Geoly although you are under oath, I ask that you be sworn again. (The Witness was duly sworn.)

Q. Mr. Geoly, what is your full name? A. Andrew Geoly.

Q. Where do you live? A. 23 Somerset Drive, South, Great Neck, Long Island.

Q. What is your business or occupation? A. On the advice of my attorney, I refuse to answer on the grounds that my reply may incriminate me.

Q. I would like you to know, Mr. Geoly, that you are not the object of this investigation, which is the crime of conspiracy and the crime of giving or receving of commercial bribes. You are here as a witness in connection with the investigation conducted by this Grand Jury and that you are not considered or will be considered as a proposed defendant in connection with the proceedings which are the object of this investigation, namely, whether or not persons have received gifts or gratuities in the form of commercial bribes in the theatrical industry or in connnection with theatrical productions. Do you understand that? A. I do.

> Mr. Cohen: Therefore, Mr. Foreman, I request that the witness be ordered to answer the question. The question is, "What is your business or occupation?"
>
> The Foreman: I direct you Mr. Geoly, to answer the question of the District Attorney.

Appendix E—Mandate of Order of Contempt (July 30, 1964) (Andrew Geoly)

The Witness: On the advice of my attorney, I refuse to answer on the grounds that my reply may incriminate me.

Mr. Cohen: Mr. Foreman, I request that this Grand Jury confer immunity on this witness and while it is my view that you can consider the conferring of immunity instanter, I will step outside with this witness and you will consider conferring of immunity upon this witness.

(Witness and Mr. Cohen and Grand Jury stenographer retire, and return.)

The Foreman: Mr. Geoly, you are still under oath. The Grand Jury has prerogative of conferring upon you immunity for any crime that may be the subject of this investigation. It has voted to do so.

Mr. Cohen: Will you instruct this witness that the Grand Jury has conferred immunity upon this witness?

The Foreman: It has conferred immunity upon you. I remind you only that you would be subject to the laws of perjury if you do not answer truthfully. Otherwise you are immune from prosecution.

Mr. Cohen: Also, will you advise this witness in that connection that he is subject to prosecution of contempt if his answer should be evasive or if he should refuse to answer legal and proper questions of this Grand Jury.

The Foreman: That is correct, you may be prosecuted for contempt or perjury but not for any crime.

Appendix E—Mandate of Order of Contempt (July 30, 1964) (Andrew Geoly)

Mr. Cohen: A proceeding for criminal contempt can be instituted against him for his failure to answer a legal and proper question of this Grand Jury. Do you understand this?

The Witness: I do, sir.

Q. Mr. Geoly, I ask you, what is the nature of your employment or occupation? A. I should like, at this time, to consult with my attorney if you don't mind, sir.

Q. Are you aware that you are not to be prosecuted or subject to any penalty or forfeiture for, or on account, of, any transaction, matter or thing concerning which you will give answer or produce evidence? A. I should like to discuss this with my attorney, please.

Q. Are you aware that any such answer that you may give pursuant to a proper question— A. I have asked—I should like to discuss it further with my attorney.

Mr. Cohen: Very well, will you please step outside so that you can confer with your lawyer.

The Witness: Thank you.

(Witness retires from Grand Jury room.)

Q. Mr. Geoly, you are still under oath. Have you conferred with your attorney? A. I have.

Q. What is the name of your attorney? A. Kleinman, Gold and Landman.

Q. You conferred with Mr. Gold, I take it? A. Yes.

Mr. Cohen: I ask that the Foreman direct this witness to answer the legal and proper question of

Appendix E—Mandate of Order of Contempt (July 30, 1964) (Andrew Geoly)

this Grand Jury, which I still pose to this witness.

The Foreman: Mr. Geoly, I so direct you. Immunity has been granted you.

The Witness: Thank you.

The Foreman: With the exceptions that I mentioned.

The Witness: I would like to make a statement now.

Q. Well? A. I should like to read a statement.

Q. Please answer what your employment or occupation is. A. I refuse to answer on the advice of my attorney on the ground that my answer might tend to incriminate me and I should like to read the statement.

Mr. Cohen: Very well.

Statement read into record which commences with the words "I respectfully refuse the offer of immunity * * * ".

And the Court having decided that the said question was legal, proper and relevant, and no lawful reason being given by the said Andrew Geoly for not having answered the said question, and the Court having directed the said Andrew Geoly to answer the said question, and the said witness having stated to the Court that he would continue to refuse to answer the lawful and proper question, and the said Andrew Geoly persisting in contumaceously and unlawfully refusing to answer said question,

It is therefore summarily

Appendix E—Mandate of Order of Contempt (July 30, 1964) (Andrew Geoly)

ORDERED AND ADJUDGED that the said Andrew Geoly is guilty of contempt of Court in having committed the acts above set forth, and it is.

ORDERED AND ADJUDGED that for the said criminal contempt of court the said Andrew Geoly be committed to the custody of the Sheriff of the City of New York at the Civil Jail, 434 West 37th Street, City, County and State of New York, for a term of thirty (30) days and that he pay a fine of two hundred fifty dollars ($250).

Dated, New York, N. Y., July 30, 164.

CHARLES MARKS
Justice of the Supreme Court

APPENDIX F

Mandate of Order of Contempt (July 30, 1964) (Thomas Geoly)

At a Term of the Supreme Court of the State of New York, held in and for the County of New York, in Part XXX thereof, at the Criminal Courts Building, 100 Centre Street, City, County and State of New York, on the 30th day of July, 1964.

Present:

HON. CHARLES MARKS,

Justice.

In the Matter

of

The Application of the Second July 1964 Grand Jury of the County of New York to punish

THOMAS GEOLY

for Criminal Contempt.

MANDATE OF ORDER ADJUDGING WITNESS GUILTY OF CONTEMPT

The Second July, 1964 Grand Jury, heretofore in due form of law selected, drawn, summoned and sworn to serve as Grand Jurors in the Supreme Court of the State of New York, a court of record in and for the County of New York, and now actually acting as the Second July, 1964 Grand

Appendix F—Mandate of Order of Contempt (July 30, 1964) (Thomas Geoly)

Jury in and for the body of the said County of New York, having made application herein by Order to Show Cause dated July 9, 1964, pursuant to Section 619 of the Code of Criminal Procedure and Article 19 of the Judiciary Law, duly served upon Thomas Geoly, and a hearing having been had on said application on July 13, 1964, July 14, 1964 and further hearing pursuant to intermediate memorandum decision of this Court dated July 23, 1964, having been had on July 28, 1964, come into court on July 29, 1964 and make complaint by and through their foreman, theretofore duly appointed and sworn, and it appearing to the satisfaction of the Court that Thomas Geoly, on July 7, 1964 and on July 29, 1964, after appearing before said Grand Jury as a witness and after having been duly sworn in the manner prescribed by law as a witness in a certain matter and investigation pending before such Grand Jury whereof they had cognizance against John Doe et al for the crime of conspiracy in violation of Penal Law Section 580 and the crime of corrupt influencing of agents, employees and servants, in violation of Penal Law Section 439, did persistently refuse to answer a legal, proper and relevant question concerning his employment and occupation which was propounded to him, and the said Thomas Geoly instead of answering the said question refused to answer and did contumaceously and unlawfully refuse to answer the same and gave no lawful reason therefor;

And the Court, on July 29, 1964, after hearing argument by counsel for the said witness Thomas Geoly and the District Attorney, and having then and there held a hearing at which the foreman of the said grand jury declared that

Appendix F—Mandate of Order of Contempt (July 30, 1964) (Thomas Geoly)

Thomas Geoly with the same persistence and devices as Andrew Geoly refused to answer the question "what is your employment or occupation" notwithstanding the grant of immunity conferred upon the said Thomas Geoly.

And the Court having decided that the said question was legal, proper and relevant, and no lawful reason being given by the said Thomas Geoly for not having answered the said question, and the Court having directed the said Thomas Geoly to answer the said question, and the said witness having stated to the Court that he would continue to refuse to answer the lawful and proper question, and the said Thomas Geoly persisting in contumaceously and unlawfully refusing to answer said question,

It is therefore summarily

ORDERED and ADJUDGED that the said Thomas Geoly is guilty of contempt of court in having committed the acts above set forth, and it is

ORDERED and ADJUDGED that for the said criminal contempt of court the said Thomas Geoly be committed to the custody of the Sheriff of the City of New York at the Civil Jail, 434 West 37th Street, City, County and State of New York, for a term of thirty (30) days and that he pay a fine of two hundred fifty dollars ($250).

Dated, New York, N. Y., July 30, 1964.

CHARLES MARKS
Justice of the Supreme Court

APPENDIX G

Application to New York Court of Appeals for Permission to Appeal

COURT OF APPEALS

STATE OF NEW YORK

In the Matter of the Application of

ANDREW GEOLY and THOMAS GEOLY,

Petitioners,

vs.

HONORABLE CHARLES MARKS as Justice of the Supreme Court of the State of New York, County of New York, and The Supreme Court of the State of New York, County of New York,

Respondents,

To review and annul, pursuant to Article 78 of the Civil Practice Law and Rules, the respective adjudications and the respective mandates of orders dated July 30, 1964, adjudging each of the petitioners guilty of criminal contempt of court, and punishing each of them therefor

and/or

In the Matter of the Respective Applications of the Second July 1964 Grand Jury of the County of New York to Punish Andrew Geoly and Thomas Geoly for criminal contempt.

ANDREW GEOLY and THOMAS GEOLY,

Appellants-Movants.

Appendix G—Application to New York Court of Appeals for Permission to Appeal

NOTICE OF MOTION FOR STAY PENDING APPEAL TAKEN AS OF RIGHT, OR, ALTERNATIVELY, FOR PERMISSION TO APPEAL AND FOR STAY PENDING SUCH APPEAL BY PERMISSION

SIRS:

PLEASE TAKE NOTICE, that on Monday, November 23, 1964, at 10 A. M. in the forenoon of that day or as soon thereafter as counsel can be heard, the undersigned will move before the Court of Appeals of the State of New York, at its courthouse in Albany, New York, for an order or orders as follows:

(1) An order staying, pending appeal as of right to the Court of Appeals under C.P.L.R., Section 5601(b), the execution of respective orders of the respondent, Honorable Charles Marks, dated July 30, 1964, which sentenced each of the within appellants-movants to imprisonment and fine for criminal contempt of court, the appeal herein being from an order of the Appellate Division, First Department, entered November 12, 1964, which dismissed Article 78 proceedings and appeal proceedings brought by the within appellants-movants to review and annul the aforesaid determinations and orders adjudging each of the appellants-movants guilty of criminal contempt and sentencing them as aforesaid.

(2) On the possibility that the within appeal which the appellants-movants have taken may be deemed by the Court of Appeals to have been improperly taken as of right, the undersigned will move, by way of alternative or supplement to such appeal as of right, if such be needed, for an order granting permission to the within appellants-

Appendix G—Application to New York Court of Appeals for Permission to Appeal

movants to appeal to the Court of Appeals from the aforementioned order of the Appellate Division, First Department, entered November 12, 1964, pursuant to C.P.L.R., Sections 5513(c), 5516 and 5602.

(3) In connection with such alternative or supplemental motion for permission to appeal, the undersigned will move also for a stay of the execution of the aforesaid orders of commitment for contempt, pending such proceedings for permission and pending the completion of such permissive appellate proceedings.

In support of the within motions, the undersigned will rely upon the record of the proceedings below herein, the printed "Notice of Petition and Joint Petition", etc., and printed brief, filed in the Appellate Division, First Department, on behalf of the within appellants-movants, the Notice of Appeal to the Court of Appeals herein, and the annexed affidavit of Eugene Gold.

Dated—Brooklyn, New York,
November 17, 1964

Yours, etc.,

KLEINMAN GOLD AND LANDSMAN
Attorneys for Appellants-Movants,
Andrew Geoly and Thomas Geoly
66 Court Street
Brooklyn 1, New York

Appendix G—Application to New York Court of Appeals for Permission to Appeal

To

Hon. Raymond J. Cannon, Clerk
Court of Appeals of the State of
New York
Albany, New York

Hon. Frank S. Hogan
District Attorney of New York County
Attorney for Respondents
155 Leonard Street
New York, New York

Appendix G—Application to New York Court of Appeals for Permission to Appeal

COURT OF APPEALS
STATE OF NEW YORK

In the Matter of the Application of
ANDREW GEOLY and THOMAS GEOLY,
Petitioners,

vs.

HONORABLE CHARLES MARKS as Justice of the Supreme Court of the State of New York, County of New York, and The Supreme Court of the State of New York, County of New York,
Respondents,

To review and annul, pursuant to Article 78 of the Civil Practice Law and Rules, the respective adjudications and the respective mandates of orders dated July 30, 1964, adjudging each of the petitioners guilty of criminal contempt of court, and punishing each of them therefor

and/or

In the Matter of the Respective Applications of the Second July 1964 Grand Jury of the County of New York to Punish Andrew Geoly and Thomas Geoly for criminal contempt.

ANDREW GEOLY and THOMAS GEOLY,
Appellants-Movants.

AFFIDAVIT

STATE OF NEW YORK }
COUNTY OF KINGS } ss.:

EUGENE GOLD, being duly sworn, deposes and says:

1. I am a member of the firm of Kleinman Gold & Landsman, the attorneys for the above-named appellants-movants. I am familiar with these proceedings. I make this affidavit

in support of the appellants-movants' motion for a stay pending appeal taken as of right, and, alternatively, for permission to appeal and for a stay in connection therewith.

2. The District Attorney who represents the respondents herein, has orally agreed to accept short notice of the within motion proceedings.

3. Annexed to these motion papers are our Notice of Appeal to this Court as of right, the order of the Appellate Division, First Department, herein sought to be appealed, the opinion of that Court, and the printed brief and the printed petition and motion papers which were filed in the Appellate Division on behalf of the within appellants-movants.

4. The printed petition and motion papers which we filed in the Court below constitute, in effect, a complete printed record of the proceedings in this case, except for the order and opinion of the Appellate Division, and our Notice of Appeal to this Court, all of which latter items are filed herewith as above mentioned. In view of the completeness of our printed record materials in the Appellate Division, and in view also of the extensiveness of our printed brief in that Court, I shall recite in an abbreviated manner the issues which we seek to raise in this Court and our grounds for a stay pending appeal.

5. The appellants-movants, having been called to testify before the Grand Jury of New York County in an investigation of alleged improper intra-industry financial practices (commercial bribery, etc.) in the New York theater industry, declined to testify on the ground of the privilege

against self-incrimination, and they continued so to decline to testify after the Grand Jury allegedly conferred immunity upon them. Proceedings to punish them for criminal contempt were instituted by order to show cause. Instead of being given a full and fair hearing or trial as upon charges of crime, as would be the ordinary course of procedure in a case of "constructive" criminal contempt, the appellants-movants were compelled by the Trial Court, overruling appellants' protests, to reiterate in the immediate face and presence of the Court their refusals to testify before the Grand Jury, and thereupon they were summarily punished for a "direct" criminal contempt, each of them being sentenced to thirty days imprisonment and a fine of $250. The execution of these sentences was stayed by court order and by consent of the District Attorney until November 12, 1964, the day of the decision of the Appellate Division herein dismissing our review and appeal proceedings in the within contempt case. At the present time the sentences have not been executed because the District Attorney has further consented to maintain the *status quo* pending the disposition of our within motions in this Court.

6. Before the Trial Court and before the Appellate Division we urged, *inter alia*, several constitutional points (State and Federal) which we intend to urge also in this Court under our Notice of Appeal as of right, which we filed on November 18, 1964. These constitutional points are recited in subsequent paragraphs of this affidavit.

7. Under C.P.L.R., Section 5601(b), this appeal is taken from an order of the Appellate Division which has finally

determined an Article 78 proceeding or action in which there is directly involved the construction of both the Constitution of the United States and the Constitution of the State of New York. The Appellate Division dismissed our Article 78 proceeding, which we had instituted on the theory that such was the appropriate procedure for review in cases of summary criminal contempt. In order to protect our appellate status, we also sought review in the Appellate Division by appeal. The Appellate Division consolidated the Article 78 and the appeal proceedings, and it dismissed both of these branches of our review proceeding.

8. The constitutional questions presented by this appeal will now be recited:

(a) Whether New York Penal Law Section 2447, in conferring upon a State Grand Jury the exercise of the immunity power, violates the principle of separation of powers under the New York Constitution in that the immunity power is within the province exclusively of the Legislative or Executive Branch of government, and, in its nature is forbidden to the Judicial Branch. The Grand Jury, as an arm of the Judicial Branch of the Government may not be empowered to exercise this legislative or executive power to confer immunity. This question is treated in Point II of our printed brief in the Appellate Division (copies filed herewith), where we note that the Supreme Court of the United States in *Ullman* v. *United States*, 350 U.S. 422, regarded the constitutional question of conferral of immunity powers upon the Judicial Branch of the

Government as being a grave question. See also, *Doyle* v. *Hofstader*, 257 NY 244 (opinion by Cardozo, C.J.), where the legislative character of the immunity power was emphasized.

(b) Whether, if this last-stated question concerning the constitutionality of the Grand Jury power to grant immunity be answered in the affirmative, it would then also follow that the New York State immunity statute (Penal Law Section 2447) as applied in this case fails to satisfy the constitutional requirements laid down in the decisions of the Supreme Court of the United States in *Malloy* v. *Hogan*, 378 U.S. 1 and *Murphy* v. *Waterfront Commission*, 378 U.S. 52. The latter decisions require that State immunity conferrals must satisfy the Fifth and Fourteenth Amendments of the Federal Constitution and must not so operate as to leave open the possibility of federal incrimination or of a reasonable fear of federal incrimination. Such danger and reasonable fear of federal incrimination arise in this case because Federal prosecuting authorities may realistically be expected to refuse to honor a New York State Grand Jury conferral of immunity under Penal Law Section 2447 on the ground of the ineffectiveness of such conferral of immunity under the New York State Constitution; i.e., the constitutional question of separation of power under the New York Constitution is one which would realistically be of interest to Federal prosecuting authorities particularly where they are faced with a thwarting of their

own right of prosecution by reason of the *Murphy-Malloy* rule of the Supreme Court of the United States which bars both State and Federal prosecution. Likewise, then, the individual to whom such a State grand jury immunity is proffered, may and should reasonably fear that Federal prosecuting authorities will choose to challenge the effectiveness of the State conferral of immunity, and that the individual will still therefore face a quite realistic danger of Federal prosecution. Among the areas of Federal incrimination as to which a State grand jury witness may reasonably entertain fear of incrimination in a State investigation of the present type are violation of the Federal Internal Revenue laws and of the Federal provisions concerning racketeering and extortion, and conspiracy charges in connection therewith.

(c) Whether the New York State grand jury immunity-conferral power under Penal Law Section 2447, as applied in this case, is also violative of the Federal Fifth and Fourteenth Amendments' requirements under the *Murphy-Malloy* decisions of the Supreme Court of the United States, in that the danger of Federal prosecution has not been adequately eliminated because Federal prosecuting authorities may realistically be expected to refuse to honor a New York State grand jury conferral of immunity under Penal Law Section 2447 in any instance where, as in this case, it does not plainly appear that fundamental procedural protections of the statute have been observed by the Grand Jury itself. In this case neither the Grand Jury

nor the District Attorney complied properly with the statutory requirements because those requirements as to the making of an immunity order, the recordation of the exercise of the statutory power, and the apprisal to the witness that the statutory requirements had been met, were not complied with in a lawful and proper manner but were treated at best in a merely perfunctory manner. The "immunity-conferrals" in this case were a procedural sham which trampled upon the vital procedural protections with which the Legislature has properly surrounded this drastic power. Federal prosecutors may well disdain to be bound by such a slack method of state "immunity." This point is fully treated in Point II of our printed brief in the Appellate Division (copies annexed hereto).

(d) Whether, if the *Murphy-Malloy* decisions of the Supreme Court of the United States are further to be taken as having imported into the field of State immunity procedures the general requirements of fairness and constitutional due process which attach to Federal immunity procedures by reason of the Federal Fifth Amendment, the grand jury immunity-conferrals in this case are violative of such Federal constitutional requirements by reason of the procedural slackness and insufficiency referred to in our question "(c)", above.

(e) Whether, in any event, the procedural slackness and insufficiency mentioned in our questions "(c)" and "(d)", above, have worked a denial of due process of

law and of the rights of appellants-movants herein to remain free from self-incrimination under the New York Constitution itself.

(f) Whether the following circumstances in this case resulted in a denial to the appellants-movants of their State and Federal constitutional rights of due process of law which should have entitled them to a full and fair trial as upon a charge of crime in these proceedings to punish them for criminal contempt of Court. Instead of being accorded a full and fair trial upon charges of "constructive" contempt of Court, the appellants-movants were compelled over their protests to re-enact, in effect, before the Court itself, their refusals to answer grand jury questions, whereby the appellants-movants were unfairly and unconstitutionally placed in the position of allegedly committing a "direct" contempt in the immediate face and presence of the Court which, in turn, was utilized by the Court as a justification for involving the processes of summary punishment as for direct criminal contempt, thereby denying appellants-movants their right to a trial or hearing.

9. It is respectfully submitted that the above-recited constitutional questions are substantial and that our appeal herein raising these questions is meritorious so as to warrant the granting of a stay of the sentences of imprisonment pending such appeal. If such stay is not granted, the appellants-movants, in all likelihood will have had to complete serving their thirty-day sentences before their appeal

to this Court can be determined. Both of the appellants-movants are substantial businessmen of the finest background of respectability.

10. Due to time limitations, this affidavit does not recite the factual history which appears in the records submitted herewith. I have agreed with the District Attorney to proceed expeditiously. As above recited, the consent-stay under which the appellants-movants' imprisonment was stayed herein expired on November 12, 1964, when the Appellate Division made and entered its order dismissing our review proceedings. The District Attorney has graciously consented to maintain the status quo pending our within application for a stay in this Court, and upon condition that we would make our motion for stay returnable in this Court not later than November 23, 1964, and that we would serve the District Attorney with a copy of our papers by November 18, 1964. In view of the unusual time difficulties, we respectfully request that this Court treat the within motion papers and the annexed matters as an alternative motion for permission to appeal pursuant to C.P.L.R. Sections 5513(c), 5516, and 5602, i.e., as an alternative to our appeal taken as of right if such latter appeal should be deemed to have been improperly taken. We also respectfully request that the within application for a stay pending appeal should likewise be considered in connection with the possible alternative treatment of these papers as a motion for permission to appeal. In any event, if the Court should deem that our appeal taken as of right is not jurisdictionally proper, and if the Court should also not be disposed to treat these

present papers alternatively as a motion for permission to appeal, we would respectfully pray that the Court grant a stay pending the prompt filing by us of appropriate printed papers for a motion for permission to appeal, and pending the disposition of such motion and of the permissive appeal which may follow.

11. Appellants-movants will comply with any expedited schedule which this Court may require for the perfecting and argument of the within appeal itself.

ADDENDUM

After I had completed the writing of my aforesaid affidavit averments, it came to my attention on the morning of Wednesday, November 18, 1964, that in the latest issue of *U.S. Law Week*, November 17, 1964, there is reported the following decision which strikingly confirms the entire fundamental basis of our main constitutional contentions in this case. The decision to which I refer, in the latest issue of *U.S. Law Week*, is a decision by United States District Judge Levet in the Southern District of New York, on November 4, 1964, entitled "U.S. v. Interborough Delicatessen Dealers Association, Inc."

It has been the very essence of our constitutional position in regard to the immunity issues throughout this present litigation that Federal prosecutors are not likely to sit by resignedly and accept any large scale or indiscriminate wave of State immunity conferrals whose result, under the *Murphy-Malloy* cases, would be to bar Federal as well as State prosecution. It has been our main theory throughout this case that diligent and conscientious Federal prosecu-

tors would do their utmost to confine or, so to say, to whittle down the thwarting effects of State immunity conferrals. It has also been an important part of our theory in this case that the *Murphy-Malloy* cases would be construed by Federal prosecutors and Federal Courts as imposing Federal constitutional standards in determining the adequacy and the efficacy of any particular State immunity conferral whenever State immunity conferral is raised for the purpose of barring any particular Federal prosecution.

The above-mentioned recent decision by Judge Levet in the Delicatessen Dealers case dramatically confirms both of these main features of our position in the present litigation. I am attaching to this affidavit a copy of Judge Levet's decision. Therefore, rather than recite at length the circumstances and rulings in the Delicatessen Dealers case, I respectfully urge that two features of the latter decision are pertinent to our case:—

(1) The Federal prosecutors in that case did do their utmost, apparently, to whittle down the effects of the *Murphy-Malloy* cases, i.e., they persuaded Judge Levet that a New York conferral of immunity under the facts in the Delicatessen Dealers case was not effective to bar Federal prosecution.

(2) Judge Levet ruled that a State conferral of immunity would not bar Federal prosecution unless such immunity would be effective according to Federal constitutional standards. This is exactly our position, and we are very concerned lest the indicatedly improper immunity conferrals in our case be rejected by Federal prosecuting authorities

and Federal courts, all in violation of our rights under the *Murphy-Malloy* cases.

WHEREFORE, it is respectfully prayed that the within motion or motions should be granted.

EUGENE GOLD

Sworn to before me this
18th day of November, 1964.

FRANK PECENIK
Notary Public, State of N. Y.
No. 24-8309728 Qual. in Kings Co.
Commission Expires March 30, 1966

[Opinion of Appellate Division, which was a part of this Appendix G, appears herein as Appendix C, *supra*.]

[Order of Appellate Division, which was a part of this Appendix G, appears herein as Appendix B, *supra*.]

[Notice of Appeal as of Right to Court of Appeals, which was a part of this Appendix G, will be filed as part of the certified record herein (copy of said Notice of Appeal being temporarily unavailable).]

[Opinion in United States v. Interborough Delicatessen Dealers Ass'n, which was apperded to the papers comprising this Appendix G, appears herein as Appendix J, *infra*.]

APPENDIX H

"Respondents' Memorandum" in New York Court of Appeals

COURT OF APPEALS
STATE OF NEW YORK

In the Matter of the Application of
ANDREW GEOLY and THOMAS GEOLY,
Petitioners,

vs.

HONORABLE CHARLES MARKS as Justice of the Supreme Court of the State of New York, County of New York, and The Supreme Court of the State of New York, County of New York,
Respondents,

To review and annul, pursuant to Article 78 of the Civil Practice Law and Rules, the respective adjudications and the respective mandates of orders dated July 30, 1964, adjudging each of the petitioners guilty of criminal contempt of court, and punishing each of them therefor

and/or

In the Matter of the Respective Applications of the Second July 1964 Grand Jury of the County of New York to Punish Andrew Geoly and Thomas Geoly for criminal contempt.

ANDREW GEOLY and THOMAS GEOLY,

NOTICE OF MOTION FOR STAY PENDING APPEAL TAKEN AS OF RIGHT, OR, ALTERNATIVELY, FOR PERMISSION TO APPEAL AND FOR STAY PENDING SUCH APPEAL BY PERMISSION

RESPONDENT'S MEMORANDUM

FRANK S. HOGAN
District Attorney
New York County

Appendix H—"Respondents' Memorandum" in New York Court of Appeals

This memorandum is filed in opposition to the appellants' notice of appeal as of right, or in the alternative, motion for leave to appeal, and their motion to stay execution of the orders adjudging them in contempt pending review by this Court. The issues raised by the appellants have been discussed in our brief to the Appellate Division of the Supreme Court, First Department, copies of which are enclosed. We believe that that brief indicates that no substantial constitutional issue is involved and that, indeed, the appellants' contentions do not present questions of law that warrant review by this Court.

In an addendum to the affidavit supporting their motions before this Court, the appellants rely on the recent decision of the Federal District Court in *United States* v. *Interborough Delicatessen Dealers Assn.* (S.D.N.Y. 1964). Without going into the soundness of that decision, it does not apply to the instant case because that case turns on the fact that the witnesses never invoked the Fifth Amendment privilege against self-incrimination, and immunity was never conferred on them. Under New York law two of the witnesses acquired immunity automatically because they were subpoenaed, even though they were the target of the investigation; the third witness appeared voluntarily in response to a letter. The District Court held that since there had been "no refusal to answer questions and no explicit claim of privilege",* the witnesses' testimony was not "compelled" within the meaning of the Fifth Amendment. In the instant case, the witnesses claimed the

* Page 6 of unpublished opinion appended to appellants' notice of motion and affidavit.

privilege and immunity was specifically conferred. Thus, the problem with which the *Interborough Delicatessen Dealers* case was concerned does not arise. While this case holds, as appellants contend, that the existence of immunity from federal prosecution must be determined by federal standards, it does not further their argument that the immunity conferred on them is invalid because they have not shown that the immunity statute and the procedure pursuant to which they were adjudicated in contempt fails to satisfy federal requirements. Our brief to the Appellate Division indicates that the New York statute is almost identical to a federal immunity statute specifically sustained by the United States Supreme Court, and that the identical procedure has been used in and sustained by the federal courts.

THE MOTION FOR A STAY

Should this Court determine that an appeal lies, either as a matter of right or by leave of the Court, the appellants' motion for a stay should nevertheless be denied. The appellants first appeared before the grand jury and refused to testify on July 7, 1964. They were held in contempt on July 29, 1964. The Appellate Division of the Supreme Court, First Department, unanimously dismissed their appeal and petition pursuant to Article 78 of the C.P.L.R. on November 12, 1964. Because of the short statute of limitations applicable to the crimes under investigation, some matters have already become moot, and if the appellants are permitted to further delay the investigation they may well succeed in thwarting it entirely.

Appendix H—"Respondents' Memorandum" in New York Court of Appeals

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

MALVINA H. GUGGENHEIM
Assistant District Attorney
Of Counsel

November 1964

APPENDIX I

Statutes Involved

N. Y. Penal Law §2447

Witnesses' immunity

1. In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

2. "Immunity" as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

3. "Competent authority" as used in this section means:

(a) The court or magistrate before whom a person is called to answer questions or produce evidence in a criminal proceeding other than a proceeding before a grand jury, when such court or magistrate is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence; or

(b) The court before whom a person is called to answer questions or produce evidence in a civil proceeding to which the state or a politcal subdivision thereof, or a department or agency of the state of such political subdivision, or an officer of any of them in his official capacity, is a party when such court is expressly requested by the attorney general of the state of New York to order such person to give answer or produce evidence; or

(c) The grand jury before which a person is called to answer questions or produce evidence, when such grand jury is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence; or

(d) A legislative committee or temporary state commission before which a person is called to answer questions or produce evidence at an inquiry or investigation, upon 24 hours prior written notice to the attorney general of the state of New York and to the appropriate district attorney having an official interest therein; provided that a majority of the full membership of such committee or commission concur therein; or

(e) The head of a state department or other state agency, a commissioner, deputy or other officer before whom a person is called to answer questions in an inquiry or in-

vestigation, upon 24 hours prior written notice to the attorney general of the state of New York and to the appropriate district attorney having an official interest therein. Provided, however, that no such authority shall be deemed a competent authority within the meaning of this section unless expressly authorized by statute to confer immunity.

4. Immunity shall not be conferred on any person except in accordance with the provisions of this section.

5. If, after compliance with the provisions of this section, or any other similar provision of law, a person is ordered to answer a question or produce evidence of any other kind and complies with such order, and it is thereafter determined that the appropriate district attorney having an official interest therein was not notified, such failure or neglect shall not deprive such person of any immunity otherwise properly conferred upon him. Added L. 1953, c. 891 §1, eff. Sept. 1, 1953.

N. Y. JUDICIARY LAW §§750-752, 755

§750. *Power of courts to punish for criminal contempts*

A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:

1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

2. Breach of the peace, noise, or other disturbance, directly tending to interrupt its proceedings.

3. Wilful disobedience to its lawful mandate.

4. Resistance wilfully offered to its lawful mandate.

5. Contumacious and unlawful refusal to be sworn as a witness; or, after being sworn, to answer any legal and proper interrogatory.

6. Publication of a false, or grossly inaccurate report of its proceedings. But a court can not punish as a contempt, the publication of a true, full, and fair report of a trial, argument, decision, or other proceeding therein.

7. Wilful failure to obey any mandate, process or notice issued pursuant to articles sixteen, seventeen, eighteen, eighteen-a or eighteen-b of the judiciary law, or to rules adopted pursuant thereto, or to any other statute relating thereto, or refusal to be sworn as provided therein. Applications to punish the accused for a contempt specified in this subdivision may be made by notice of motion or by order to show cause, and shall be made returnable as the term of the supreme court at which contested motions are heard, or of the county court if the supreme court is not in session. As amended L. 1954, c. 305, §18; L. 1955, c. 864, §13, eff. July 1, 1955.

B. In addition to the power to punish for a criminal contempt as set forth in subdivision A, the Supreme Court has power under this section to punish for a criminal contempt any person who unlawfully practices or assumes to practice law; and a proceeding under this subdivision may be instituted on the court's own motion or on the motion of any officer charged with the duty of investigating or prosecuting unlawful practice of law, or by any bar association incorporated under the laws of this state.

C. A court not of record has only such power to punish for a criminal contempt as is specifically granted to it by statute and no other. As amended L. 1937, c. 311, §2; L. 1940, c. 202, §15; L. 1943, c. 538; L. 1947, c. 900, §1, eff. Sept. 1, 1947.

§751. *Punishment for criminal contempts*

Punishment for a contempt, specified in section seven hundred and fifty, may be by fine, not exceeding two hundred and fifty dollars, or by imprisonment, not exceeding thirty days, in the jail of the county where the court is sitting, or both, in the discretion of the court. Where a person is committed to jail, for the nonpayment of such a fine, he must be discharged at the expiration of thirty days; but where he is also committed for a definite time, the thirty days must be computed from the expiration of the definite time.

Such a contempt, committed in the immediate view and presence of the court, may be punished summarily; when not so committed, the party charged must be notified of the accusation, and have a reasonable time to make a defense.

§752. *Requisites of commitment for criminal contempt; review of certain mandates*

Where a person is committed for contempt, as prescribed in section seven hundred fifty-one, the particular circumstances of his offense must be set forth in the mandate of commitment. Such mandate, punishing a person summarily for a contempt committed in the immediate view and

presence of the court, is reviewable by a proceeding under article seventy-eight of the civil practice law and rules. As amended L. 1962, c. 310, §239, eff. Sept. 1, 1963.

§755. *When punishment may be summary*

Where the offense is committed in the immediate view and presence of the court, or of the judge or referee, upon a trial or hearing, it may be punished summarily. For that purpose, an order must be made by the court, judge, or referee, stating the facts which constitute the offense and which bring the case within the provisions of this section, and plainly and specifically prescribing the punishment to be inflicted therefor. Such order is reviewable by a proceeding under article seventy-eight of the civil practice law and rules. As amended L. 1962, c. 310, §241, eff. Sept. 1, 1963.

APPENDIX J

Opinion of Levet, *D.J.*, S.D.N.Y., in *U. S. A.* v. *Interborough Delicatessen Dealers Association, Inc., et al.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

62 Cr. 515

UNITED STATES OF AMERICA,

—against—

INTERBOROUGH DELICATESSEN DEALERS ASSOCIATION, INC., et al.,

Defendants.

OPINION

Appearances:

John J. Galgay, Chief
Department of Justice, Antitrust Division
Attorney for United States of America
42 Broadway, New York, N. Y.
David H. Harris,
Phillip Cody,
Of Counsel.

Appendix J—Opinion of Levet, D.J., S.D.N.Y., in U. S. A. v. Interborough Delicatessen Dealers Association, Inc., et al.

Corcoran, Kostelanetz & Gladstone
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52 Wall Street
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Boris Kostelanetz,
Edward J. Daus,
Of Counsel.

Meyer Schiff
Attorney for Defendant Leonard Pines
110 East 42 Street
New York, N. Y.

David M. Markowitz and Frederick M. Molod
Attorneys for Defendants Interborough Delicatessen Dealers Association, Inc. and Louis Molod
261 Broadway, New York, N. Y.
David M. Markowitz,
Of Counsel.

LEVET, D. J.

The defendants Cohen, Pines and Molod have moved pursuant to Rules 6(e), 12 and 57(b) of the Federal Rules of Criminal Procedure to dismiss the indictment against them. The defendants contend that the United States government in its preparation and presentation of this case used evidence given by them in an investigation conducted by the New York State Attorney General.

The defendants Cohen and Pines were subpoenaed and testified under oath before an Assistant State Attorney General. The defendant Molod appeared voluntarily and

testified under oath before an Assistant State Attorney General. The determination I have reached makes its unnecessary to treat the motions of these defendants separately.

Under New York law it is clear that the defendants Cohen and Pines received immunity from any use by the state authorities of their testimony in any subsequent state proceeding. Article I, §6 of the New York State Constitution states in pertinent part: " * * * No person * * * shall * * * be compelled in any criminal case to be a witness against himself * * *."

The New York courts have held that the individual need not assert the privilege, saying: " * * * a prospective defendant or one who is a target of an investigation may not be called and examined before a Grand Jury and, if he is, his constitutionally-conferred privilege against self incrimination is deemed violated even though he does not claim or assert the privilege." People v. Steuding, 6 N.Y. 2d 214, 217 (1959). The issuance of a subpoena provides the compulsion necessary to invoke the constitutional privilege. "In such a case the subpoena is deemed to be a form of compulsion, and the testimony thus compelled may not be used against the defendant as the basis of an indictment, or for any other purpose." People v. Laino, 10 N.Y. 2d 161, 171 (1961). "The scope of the inquiry," id at 170, made these defendants prospective targets within the protection of the New York Constitution. People v. DeFeo, 284 App. Div. 622, rev'd on other grounds, 308 N.Y. 595 (1955).

The defendants Cohen and Pines, then, have obtained the immunity from prosecution provided by the New York Con-

stitution. Standing alone, of course, this is not sufficient to provide any federal immunity. Although the federal government may, under the Supremacy Clause, grant immunity from state prosecution, a state may not unilaterally extend an immunity from federal prosecution. Murphy v. Waterfront Comm'n, 378 U.S. 52, 71 (1964).

The source of any immunity to which the defendants herein are entitled must be federal. There is no federal statutory immunity available here. The provision immunizing one who testifies in any proceeding under 15 USC §§1-11 relating to violations of the antitrust laws is inapplicable. 15 USC §32; United States v. Monia, 317 U.S. 424 (1943). It is asserted, however, that the Fifth and Fourteenth Amendments of the United States Constitution as interpreted in Murphy v. Waterfront Comm'n, supra, insulate them from federal prosecution.

In Murphy, the court concluded: "[W]e hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him" 378 U.S. at 79. There the petitioners were subpoenaed to testify at a hearing conducted by the Waterfront Commission of New York Harbor (a bi-state body). Notwithstanding a grant of immunity from prosecution under the laws of New Jersey and New York, the petitioners refused to answer questions at the hearing on the ground that the answers might tend to incriminate them under federal law. Petitioners were held in contempt of court and the New Jersey Supreme

Court affirmed the civil contempt judgments. The convictions were vacated by the Supreme Court.

The opinion in Murphy did not indicate what standard was to be applied in determining when the Constitutional privilege is conferred. The court declared only that in connection with a criminal prosecution the federal government must be prohibited from using testimony that the defendant has been *compelled* to provide in a state proceeding, 378 U.S. at 79. Whether "compulsion" had a federal or state definition the court did not specify.

However, if each state were permitted to define "compulsion" as it relates to the federal self-incrimination privilege, then Cohen and Pines under the New York interpretation would be entitled to an immunity from any federal prosecution utilizing their compelled testimony or its fruits, since as New York defines it these defendants were *compelled* to testify.

The dispositive issue here is whether the meaning of the word "compelled" in the construction of the Fifth and Fourteenth Amendments set forth in Murphy is to be governed by state or federal standards.

In Malloy v. Hogan, 378 U.S. 1 (1964), a case decided the same day as Murphy, the Supreme Court decided "that the Fourteenth Amendment guaranteed the petitioner the protection of the Fifth Amendment's privilege against self-incrimination. * * *" 378 U.S. at 10. In so doing the court held that "the same standards must determine whether an accused's silence in either a federal or state proceeding is justified." 378 U.S. at 11. In reaching this latter conclusion the court stated:

> "We have held that the guarantees of the First Amendment, the prohibition of unreasonable searches and seizures of the Fourth Amendment, and the right to counsel guaranteed by the Sixth Amendment are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against Federal encroachment. [All citations omitted]." 378 U.S. at 10.

I conclude, therefore, that federal standards must govern in determining when testimony is compelled. Any other conclusion would fail to observe the traditional limitations of state sovereignty. A state may not provide a lesser privilege than that guaranteed by the United States Constitution. See 378 U.S. at 10-11. Nor may it unilaterally expand the federal privilege outside its own jurisdiction.

The question next presented is whether a subpoena qualifies as compulsion to testify under federal standards where there has been no refusal to answer questions and no explicit claim of privilege.

It is clear that these defendants would have obtained no federal constitutional immunity had they testified in a federal proceeding without claiming the privilege. "The privilege may not be relied on and must be deemed vaived if not in some manner fairly brought to the attention of the tribunal which must pass upon it." Vajtauer v. Comm'r of Immigration, 273 U.S. 103 at 113 (1927); see Smith v. United States, 337 U.S. 137, 150 (1949); Emspak v. United States, 349 U.S. 190 (1955). Or as restated, "If a witness before a grand jury desires the protection of the privilege, he must claim it or he will not be considered to have been

compelled to testify within the meaning of the Amendment." United States v. Pile, 256 F. 2d 954, 956 (7th Cir. 1958).

The Fifth Amendment guarantee does not prevent a witness from voluntarily giving incriminating testimony. "The Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him." United States v. Monia, 317 U.S. 424, 427 (1943).

Murphy does not suggest a different standard. There the witness claimed the privilege and, after being granted state immunity, continued to claim the privilege on the basis of federal incrimination.

In the present case all three defendants, accompanied by counsel, testified before the Assistant State Attorney General and never made any claim of privilege. Indeed, the defendant Molod appeared and testified in answer to a letter addressed not to him but to Interborough Delicatessen Dealers Association, Inc. Therefore, no defendant was compelled to testify in federal terms and no one of the defendants is entitled to the protection against self-incrimination provided by the United States Constitution.

For the foregoing reasons I am constrained to deny the motions to dismiss the indictments. The motions of defendants Cohen, Pines and Molod are denied in all respects.

Settle orders on notice.

Dated: New York, N. Y.
November 4, 1964.

RICHARD H. LEVET
United States District Judge